

WILLIAM F. FRIEDMAN

Individual Defendant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 161

DORA SUROWITZ,

Individually and on behalf of all other similarly situated
shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

**HILTON HOTELS CORPORATION, a corporation, CONRAD N.
HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY,
JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN,
HORACE C. FLANIGAN, BENNO M. BECHHOLD, Y. FRANK
FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM
D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERB-
ERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A.
GROVES, JOSEPH A. HARPER, BARRON HILTON AND
HILTON CREDIT CORPORATION, a corporation,**

Respondents.

OPPOSITION BRIEF OF INDIVIDUAL RESPONDENTS

*To the Honorable, the Chief Justice of the United States,
and the Associate Justices of the Supreme Court
of the United States:*

Respondents pray that the Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

The petition should be denied for three basic reasons:

1. The Decision of the Court of Appeals Is Clearly and Necessarily Correct.

This derivative action was dismissed by the trial court because plaintiff failed to comply with the verification requirements of F.R.C.P. 23(b). Plaintiff filed a purported verification, but the uncontradicted testimony of the plaintiff herself established that the verification was false, and, therefore, a nullity. The decision of the Court of Appeals upholding the dismissal involves only an application to the undisputed facts of the self-evident propositions that parties to actions in the Federal courts must comply with the applicable Federal Rules of Civil Procedure and that failure to comply justifies dismissal.

2. The Decision of the Court of Appeals Is Not In Conflict With the Decision Of Any Other Court.

This case concerns the verification requirement of the Rule 23(b). The cases cited by petitioner relate to signature of counsel under Rule 11 or to the knowledge required of a witness. Nothing in these cases justifies plaintiff's filing of a false verification or plaintiff's failure to comply with Rule 23(b) of the Federal Rules of Civil Procedure. No conflict of decisions has been or could be shown.

3. The Decision of the Court of Appeals Will Not Discourage Either Shareholders' Derivative Actions In General Or Actions Under the Securities Acts In Particular.

Assuming arguendo a policy encouraging derivative actions or actions under the Securities Acts, there is nothing in the decision of the Court of Appeals which conflicts with such a policy. Plaintiff's action was dismissed because she filed a patently false affidavit and therefore failed to comply with the express requirements of the Federal Rules. Since the decision of the Court of Appeals is based upon the falseness of plaintiff's affidavit, the arguments in the petition amount to an outrageous and unsupported contention that the public policy of the Securities Acts cannot be fulfilled without encouraging the filing of false affidavits. Even the poorly educated and uninformed have the duty to tell the truth. In fact, the petition makes no showing of the necessity of nullifying Rule 23(b) in order to promote the policy of the Securities Acts.

There is nothing in the decision of the Court of Appeals which will discourage derivative actions. The decision requires only that such actions be truthfully verified. The Court has even reserved the question of whether a verification must be made personally by a plaintiff or whether it may be made by the plaintiff's attorney or agent. Since the entire petition is based upon the assumption that *personal verification* by a plaintiff is required, the Court of Appeals' reservation of this issue makes a mockery of petitioner's anguished cries concerning "literacy tests" and "barring as plaintiffs numerous uninformed and ill² educated stockholders" (Pet. 10, 17).

I.

THE DISMISSAL OF THE COMPLAINT WAS A PROPER AND INDEED NECESSARY MEASURE TO ENFORCE THE FEDERAL RULES. THE ONLY ALTERNATIVE IS A NULLIFICATION OF RULE 23(b).

The dismissal of the complaint by the trial court and the affirmance of that dismissal by the Court of Appeals rested on four propositions:

(1) Rule 23(b) FRCP required the complaint in this action to be verified;

(2) The uncontradicted testimony of the plaintiff on her deposition conclusively established that her verification was made without even the most elemental familiarity, knowledge, information *or* understanding concerning the subject matter of the complaint. Accordingly, the verification, in which plaintiff swore to familiarity with the complaint and to such knowledge and information, was indubitably false;

(3) Ignoring suggestions by the trial court, plaintiff insisted on standing upon the false verification;

(4) The trial court, confronted with this situation, properly dismissed the complaint pursuant to Rule 41(b). Under the circumstances, the dismissal was the only action consistent with the integrity and enforcement of the Federal Rules.

Obviously, the petition, if it is to challenge successfully the decisions of the District Court and the Court of Appeals, must destroy one or more of the four propositions stated above. Not only does the petition fail to come to grips with any of these propositions, but it also seeks to obscure the facts applicable to each. As the following discussion demonstrates, all four propositions and the decisions of the lower courts are correct.

A. Rule 23(b) Required the Complaint in This Action to be Verified.

Rule 23(b) unequivocally requires that in all "secondary" or derivative actions by shareholders to enforce corporate causes of action, "the complaint shall be verified by oath." The Rule applies to "all suits of a civil nature" in the United States District Courts, whether jurisdiction is based upon diversity of citizenship or upon the existence of a Federal question under statutes such as the Securities Acts. FRCP Rule 1. There is nothing in the Federal Securities Acts which excuses compliance with the verification requirement of Federal Rule 23(b).

The complaint in all of its Counts alleges derivative causes of action. This is expressly conceded in the petition (Pet. 2)* and is obvious from the complaint. Paragraph 1 of Count I of the complaint (which is incorporated by reference in each of the other Counts) states that:

"Plaintiff brings this action to enforce rights of the defendant Corporation, Hilton Hotels Corporation . . . " (A. 2)

All of the Counts of the complaint seek relief solely on behalf of the corporation. No relief is sought or could be sought for the plaintiff shareholder individually, apart from costs and attorneys' fees.

* The following abbreviations are used herein to designate the various appendices and briefs heretofore filed:

Petition for Certiorari (Pet.),

Appendices of Record filed in Court of Appeals as follows:

Appendix filed by plaintiff (A.).

Supplemental Appendix filed by defendants (Supp. A.),

Additional Appendix filed with plaintiff's Reply

Brief (Add'l. A.),

Opinion of Court of Appeals,

Appendix A to Petition (App. A.).

Plaintiff's counsel, in instituting this action, recognized the derivative character of the suit and the applicability of the verification requirement of Rule 23(b). The complaint was filed with a verification by Mrs. Surowitz, who swore to the correctness of all of the allegations on the basis of either personal knowledge or information and belief (A. 64).

The petition does not face up to the issue of whether the complaint was required to be verified.

At times the petition appears to rely upon the adequacy of counsel's compliance with the requirements for attorneys' signatures to the complaint under Rule 11. But the Rules specifically require that, in derivative actions, there must be *both* signature of counsel under Rule 11 and verification under Rule 23(b). In the face of these specific provisions, a holding that compliance with Rule 11 excused verification under Rule 23(b) would, in effect, repeal the provisions of the latter Rule. There can be no real dispute about the necessity of verification in this case.

B. Plaintiff's Testimony Conclusively Established That Her "Verification" Was Utterly and Completely False and Therefore Did Not Comply with Rule 23(b).

Plaintiff signed under oath, the following verification:

"Dora Surowitz, being first duly sworn, on oath deposes and states that she is the plaintiff in the above-entitled cause, that she has read the above and foregoing complaint by her attorneys subscribed and is familiar with the matters therein alleged; that as to the matters alleged in [certain specified paragraphs of the Complaint] said allegations are true and correct. That as to all other matters alleged in the above and foregoing Complaint, she makes said allegations on information and belief and believes them to be true."
(A. 64)

As the careful analysis by the Court of Appeals shows, plaintiff's own testimony on her deposition conclusively and unequivocally demonstrates the complete falsity of that verification. Mrs. Surowitz' knowledge and information concerning the lawsuit and the allegations of the complaint was limited to her name, her address, the fact that she owned stock in the Hilton Hotels Corporation, her conclusion that the stock "wasn't right", her receipt of the tender offer, her signature of a protest letter which she did not understand, and the fact of her status as a plaintiff in a suit about which she had no knowledge. She had not even the vaguest or most elemental conception of the serious charges made in the complaint. No questions of general application nor of the Securities Acts are presented. The sole question is whether her false affidavit constituted sufficient compliance with Rule 23(b). The answer is obvious. As the lower courts found, the false affidavit is a nullity.

At times, when the petition speaks of a plaintiff's cause of action depending upon her "skill in deposing" or states that "Mrs. Surowitz' crime is that she could not understand *all* that she was told" (Pet. 13, 18)*, plaintiff's counsel seem to indicate that they take issue with the conclusions of the lower courts with respect to the falsity of plaintiff's verification. However, the petition never squarely faces up to this issue.

In any event, the statements that dismissal was based upon Mrs. Surowitz' lack of "skill in deposing" or her failure to understand "all that she was told" are plain misstatements of the record, and misdescriptions of the decision of the Court of Appeals. It is equally inaccurate

* All emphasis herein is supplied unless otherwise stated.

to suggest, as does the petition, that the lower courts conditioned the maintenance of a shareholder's derivative action upon detailed knowledge and understanding of complicated financial transactions.

The Court of Appeals stated that most shareholder plaintiffs "would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance" and "would have to rely upon the opinions and advice of trained counsellors for many of the principal allegations of such a complaint." (App. A. 33). The Court also concluded that a "sensible interpretation" of Rule 23(b) "must relieve" plaintiffs "from the necessity of recalling technical factual information which [they] received from trusted advisers." (App. A. 34). The Court also concluded "we think that the Rule would be satisfied by a verification of intricate factual and conclusory allegations *in reliance upon such advice and information.*" (App. A. 35).

In the light of the undisputed facts of the instant case, however, the Court of Appeals concluded that "it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about" (App. A. 35) and that "plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant." (App. A. 34). In fact, no other conclusions could reasonably be drawn from plaintiff's deposition. It would serve no useful purpose to repeat the detailed analysis of the deposition which appears in the opinion of the Court of Appeals. (App. A. 32-36). Suffice it to say that plaintiff's utter lack of information about the lawsuit is clearly demonstrated by:

- (1) Her affirmative statements that she did not know anything about any of the individual defendants nor about any wrongful acts allegedly committed by any of them,

and her affirmative statements that she had no knowledge, information or understanding concerning the nature of the repurchase transactions which were the basis of the lawsuit (A. 101, 105, 107);

(2) Her failure to supply any information whatever in response to detailed questions concerning a substantial number of the allegations of the complaint. All of her answers amounted to "I don't know" or "I don't understand" (A. 102-107);

(3) The stipulation of petitioner's counsel that Mrs. Surowitz would answer all questions about any of the remaining allegations of the complaint by a complete disavowal of any knowledge or information (A. 107).

The petition appears to argue that, even assuming a complete lack of information or understanding, the verification was not false or was false only in an "unusual sense." (Pet. 3). On the contrary, plaintiff's deposition showed the verification to be false in the most common and rudimentary sense of that term. It was false because plaintiff swore that she was *familiar* with the allegations of the complaint, whereas in fact she knew nothing about these allegations or about the subject matter of the complaint. It was false because she swore that certain allegations were *to her knowledge true and correct*, whereas in fact she knew no more than her name and address and the fact that she owned stock in Hilton Hotels Corporation. It was false because she swore that all the other allegations of the 97 page complaint were made *upon information and belief*, whereas in fact she had neither information nor understanding of the stock transactions described in the complaint or the charges made in the complaint sufficient to form a belief as to the truth of a single one of the allegations.

The issue is not whether the complaint states a meritorious cause of action or whether particular facts alleged in the complaint are true or false. The question is whether the essential verification itself was false, and Mrs. Surowitz' deposition leaves no doubt that it was.

Such a patently false verification cannot satisfy the requirements of Rule 23(b). Petitioner has cited no authority which holds or even suggests that such a sham verification is legally sufficient. Moreover, the petition does not explain how it would be possible to accept verifications like that of Mrs. Surowitz and still leave any vitality in Rule 23(b).

Petitioner's counsel place great emphasis upon the signature of counsel to the complaint (required by Rule 11), and upon the alleged factual correctness of the allegations of the complaint itself (as distinguished from the verification), but these arguments furnish no answer to the requirements of Rule 23(b).

To illustrate, a complaint in a non-derivative action in the Federal courts must have the signatures of counsel required by Rule 11. It must also state a claim for which relief may be granted or be subject to dismissal under Rule 12. Further, such a complaint may be disposed of by summary judgment, if affidavits demonstrate that there is no genuine issue as to any material fact.

Similarly, a complaint in a shareholders' derivative action in the Federal courts must be signed by counsel and must state a claim for which relief may be granted. It is also subject to disposition on a motion for summary judgment. But in such actions Rule 23(b) specifically imposes *the additional requirement* that the complaint be "verified by oath." It is here that the positions of the parties to this cause differ. The position of respondents, and

the decisions of the Trial Court and of the Court of Appeals gives this additional requirement of Rule 23 content and effect. The position of petitioner's counsel denies the requirement of verification any effect whatever.

If a derivative action is immune from dismissal under Rule 23(b) because the complaint has been properly signed by counsel under Rule 11, or because the factual allegations of the complaint have not been shown to be false and the action is therefore immune from summary judgment, the explicit verification requirement of Rule 23 is thereby nullified and, in effect, deleted from the Rules. Obviously, this cannot be a proper construction of the Rules. Yet it is the inevitable consequences of the acceptance of petitioner's position here.

The many policy arguments set forth in the petition, fallacious as they are (see Opinion of Court of Appeals, App. A. 27-28, 31-32, 34-35), are directed, not to a construction of the verification requirement, but rather to the complete abolition of that requirement and the amendment of Rule 23(b). They have no relevance to a case governed by the specific provisions of that Rule.

C. Petitioner's Counsel Persisted In Confronting the District Court With A Choice Between Nullification of Rule 23(b) and Dismissal. Under These Circumstances, Dismissal Was Proper and Indeed Unavoidable.

As is demonstrated by the discussion at pages 15-20, *infra*, petitioner's counsel ignored the suggestions of the trial court and refused even to attempt to substitute a proper verification. The trial judge thereupon took the only action available to enforce the Federal Rules—dismissal. Rule 41(b) specifically authorized dismissal on the ground of non-compliance with the Rules, and the trial

court is supported by the authorities cited by the Court of Appeals (A. 38). In fact, the general principle that persistent failure to comply with the Federal Rules justifies dismissal has been applied in a large number of cases. The respondents, in their brief in the Court of Appeals, cited some 31 cases in which Federal courts have dismissed derivative actions for failure to comply with one or the other of the requirements of Rule 23(b) (Deft.'s Br. 52-53). There can be no question, therefore, that the trial court acted properly in dismissing the complaint.

II.

THERE IS NO EVIDENCE THAT THE COURT OF APPEALS' DECISION WILL DISCOURAGE DERIVATIVE ACTIONS.

A. Any Shareholder Should Be Able to Satisfy the Requirements of Rule 23(b) As Interpreted By the Court of Appeals. No Conflict Between the Circuits Is Presented.

The petition is premised upon the assumption that the enforcement of Rule 23(b) by the Court of Appeals will substantially impair the effectiveness of shareholder derivative actions. But there is nothing in the petition or in the record in this case or in the history of derivative actions to support such an assumption. The Court of Appeals' reasonable, and indeed liberal, interpretation of the verification requirement of Rule 23(b) is summarized as follows:

“But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general

knowledge of the wrongful acts which he alleges as a foundation for his complaint." (App. A. 35).

The liberality of this interpretation is even clearer when considered in the light of the Court's repeated statements (quoted at p. 8 *supra*) that shareholder-verifiers may rely substantially upon information received from attorneys or other advisers and that a plaintiff need not recall technical factual information in order to satisfy Rule 23(b).

It is patently absurd to suggest that such a test will disqualify any potential shareholder plaintiffs. Any plaintiff who is not a mere puppet will have no problem in satisfying it. Other *bona fide* shareholders of Hilton Hotels Corporation may challenge the corporate transactions referred to in plaintiff's complaint, provided only that they file truthful verifications (if suit is brought in a Federal court or in the courts of a state which requires verification) and otherwise comply with applicable rules of court.

Petitioner's counsel have been unable to cite a single case in the long history of shareholder derivative litigation which would have been dismissed under the Rule as interpreted by the Court of Appeals. This is hardly a showing of any general impact or effect which would require the exercise of this Court's **supervisory authority**.

In fact, petitioner's citation of *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947) and *Murchison v. Kirby*, 27 F.R.D. 14 (S.D. N.Y. 1961) as factually similar and as in conflict with the decision of the Court of Appeals in the case at bar, is an accurate measure of the desperate character of petitioner's argument. The petition ignores the liberal standard of the Court of Appeals quoted above and confuses the *first-hand knowledge* required of a

witness with the knowledge, information and belief claimed to exist by *one who verifies*. There is nothing stated or suggested in either decision which would uphold Mrs. Surowitz's verification here.

In the *Koster* case, the issue was whether an action brought in the district in which the shareholder plaintiff resided could be dismissed on the basis of *forum non conveniens*. The dismissal was upheld. Even the most cursory examination of the case demonstrates that the discussion quoted by petitioner concerned the unimportance of the shareholder plaintiff's role *in the trial of the action*, particularly as a witness. The language quoted in the petition refers to the fact that a shareholder plaintiff may have no *first-hand knowledge* of the facts of the lawsuit and therefore may not be a competent witness, and may "make no showing of any knowledge by which his presence would help to make whatever case can be made on behalf of the corporation." 330 U.S. 518, 525. This obvious truth has no relation to the case at bar. This case was not dismissed because Mrs. Surowitz lacked first-hand knowledge or could not personally *testify* at trial to the truth of the allegations in the complaint. *It was dismissed because her verification was false* and because her name and signature was used by others to justify filing a derivative action. The *Koster* case has nothing to do with verification. It is simply false to state, as does the Petition, that *Koster* placed its stamp of approval upon verification by shareholder plaintiff with "the same mental state" as Mrs. Surowitz (Pet. 14).

Murchison v. Kirby involved an attack upon a shareholder plaintiff for lack of *first-hand knowledge* of the allegations of the complaint. Plaintiff Murchison testified, as quoted in the petition:

"My information is not direct. I have asked my lawyers to see if it is possible to make a case out of this

thing. . . . I wasn't there . . . so my information is general." 27 F.R.D. 14, 19, n. 10.

The opinion in that case upheld the propriety of Murchison's reliance upon information furnished to him by his lawyers and other advisers, and rejected a contention that the suit should be dismissed as sham under Rule 11.

Again, this decision has no significance in this case. The Court of Appeals in its decision in the case at bar repeatedly emphasized that plaintiff-verifiers may rely upon information given to them by attorneys and other advisers. The report of that case shows affirmatively that Mr. Murchison had received extensive information and reports from his attorneys and that he was able to communicate such information in the course of his 1800 page deposition. A reading of the *Murchison* opinion compels the conclusion that Mr. Murchison readily satisfied the test stated by the Court of Appeals in this case. There is nothing in the opinion which suggests that his state of mind was anything like that of Mrs. Surowitz or that he had sworn to a false affidavit.

B. The Violation of Rule 23(b) Was Not Only Flagrant But Persistent. Petitioner's Counsel Ignored Repeated Suggestions That a Proper Verification Be Substituted.

The entire petition is based upon an assumption that derivative actions *must* be verified *personally* by *plaintiffs*. Counsel so state in paragraph 3 of their purported summary of the decision of the Court of Appeals. (Pet. 6). In fact, however, the Court of Appeals expressly reserved this very question, stating:

"We express no opinion upon the question whether verification of a stockholder derivative complaint by attorney would satisfy the requirements of Rule 23(b)." (App. A. 38).

It is hardly surprising that counsel for petitioner ignore this portion of the decision, for the sentence quoted above and the record in this case make a mockery of counsel's anguished cries about "closing the doors of the courts to poorly-educated and uninformed stockholders." (Pet. 17). It was counsel for petitioner, not the defendants or the lower courts, who insisted upon resting this case on Mrs. Surowitz' false affidavit. Counsel first made these matters critical by filing a complaint with a verification by the plaintiff which stated that she was familiar with the allegations, had knowledge of the truth of some, and information concerning the rest. When the falsity of this sworn statement was shown, no attempt was made to correct the defects. The record of the proceedings in the trial court shows the following:

1. When the motion to dismiss was first presented, counsel for defendants clearly stated that the motion was based in part on the falsity of the verification under Rule 23(b). (Supp. A. 6). The trial court gave petitioner's counsel fifteen days to file "such documents as her counsel might think appropriate in opposition to the motion." (Supp. A. 10). Petitioner's counsel did not take advantage of this opportunity to tender a substitute verification.

2. On argument on the motion to dismiss, the trial court repeatedly corrected the now familiar contention of petitioner's counsel that the court was discriminating against "poor and unsophisticated stockholders." The trial judge stated that the critical fact was the necessity that the verifier have sufficient knowledge and information to make a true verification. The court repeatedly suggested that a knowledgeable person should have verified the complaint, in fact stating at one point:

"I appreciate on the record here that some resourceful lawyer, relative by marriage of the plaintiff, in-

duced her to sign it [the complaint] but it seems to me that the preferable way to have gotten this complaint on file, if they wanted this woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant [the financial adviser] who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff.

"It does occur on occasions that a plaintiff necessarily is a proper party, but does not have knowledge of all of the facts. But if the plaintiff doesn't have knowledge, that plaintiff should not say that he or she does." (Supp. A. 13-14).

Later, when petitioner's counsel made one of his frequent references to the policy of the Securities Acts, the Court stated:

"Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

"You have got—it is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? That a person is ill at the time of the filing of a complaint doesn't say that she can't sign her name. It seems to me that would have been the simple way to do the thing properly." (Supp. A. 23).

But petitioner's counsel made no effort whatever to respond to the trial court's suggestions that they tender a proper verification. There was no motion to amend the complaint or to file a substitute verification. In fact, petitioner's counsel never suggested or intimated that they would retreat from their insistence upon standing on Mrs. Surowitz' "verification."

For the first time on appeal, petitioner's counsel suggested that the affidavit filed by Mr. Walter J. Rockler (one of petitioner's counsel) in opposition to the motion to dismiss should be treated as some kind of substituted or additional verification. This suggestion was made obliquely even on appeal, and this oblique approach is continued by the incidental reference to the matter on page 6 of the petition.

In fact, it is clear that this Rockler affidavit was never submitted to the trial court as a verification, that it was not intended as a verification, that it could not serve as a verification, and that the entire argument is an afterthought of counsel on appeal.

If, during the pendency of this matter in the trial court, petitioner's counsel considered the Rockler affidavit as a verification, they kept their position a closely guarded secret. There was no motion to have the court consider the affidavit as a verification. In extended arguments before the court concerning the sufficiency of Mrs. Surowitz' verification, counsel never suggested that the Rockler affidavit was a verification or was even pertinent to the 23(b) issue.

The findings of fact adopted by the trial court include the following significant statement:

"34. Plaintiff's counsel have not asked for leave to file a substitute verification or an amended complaint." (A. 156)

Paragraph 5 of the Court's conclusions of law stated:

"5. The verification of this complaint is false and sham and the complaint must be stricken. Since the plaintiff has not sought leave to substitute any other verification or filed an amended complaint, the action will be dismissed." (A. 157)

Prior to the entry of the findings of fact and conclusions of law, petitioner's counsel attacked them in oral argument on a large number of grounds. However, counsel never suggested any inaccuracy in the above quoted finding and conclusion with respect to the absence of any substitute verification.

The notion of the Rockler affidavit as a verification first appeared in this case in a vague reference in petitioner's brief in the Court of Appeals, which stated that it would involve "no unwarranted stretching of Rule 23(b) to treat Mr. Rockler's affidavit as a verification of the complaint." (Pl. Br. 54)

The language of the Rockler affidavit itself specifically limits the scope of the document in such a way as to preclude its operation as a verification. Paragraph 26 of the affidavit states:

"This affidavit is made necessary by defendants' motion of February 26, 1964 and the proceedings in Court on that date; it is filed solely for the purpose of refuting incorrect and misleading implications therein. Counsel and the plaintiff do not in any respect agree to waive and expressly reserve, the attorney-client privilege and the confidential and privileged character of counsel's work products." (A. 143)

Therefore, by reason of the deliberate choice of the petitioner's own counsel, the sufficiency of the complaint in this case has been made to depend upon the Surowitz verification, which is patently false. As the Court of Appeals properly held, the question of the propriety of a verification by an attorney or agent of the plaintiff is not presented here. Nothing in the opinion of the Court of Appeals prejudices that issue in the event that it should arise in subsequent derivative actions. And, of course, failure to demonstrate that a *personal* verification by the

plaintiff is required, destroys petitioner's entire argument concerning the alleged effect of the Court of Appeals decision on derivative actions.

CONCLUSION.

The record demonstrates that the dismissal of petitioner's complaint was a proper measure to preserve the integrity of the Federal Rules of Civil Procedure. The case does not involve issues which will have any broad impact upon derivative actions generally. The decision below is not in conflict with the decision of any other court. Consequently, the petition states no basis for the granting of the writ of certiorari.

Respectfully submitted,

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